The Supreme Court

OF THE

United States

October Term, 1941

No. 180

RALPH WAGNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

To the Honorable, The Supreme Court of the United States:

This is a petition for rehearing of a Petition that a Writ of Certiorari be issued to review a judgment of the Circuit Court of Appeals for the Ninth Circuit, entered April 8, 1941, affirming a judgment of the United States District Court for the Southern District of California, Central Division, sitting as the trier of the facts, whereby Petitioner was adjudged guilty un-

der an indictment charging income tax evasion, and was sentenced to a term of imprisonment of two years and to pay a fine of $2500.00.

The opinion of the judgment, affirming the judgment of the District Court is printed in the Transcript of Record, page 146. Pointing specifically to that part of the Opinion headed "A Motion for New Trial or to Remand," and incorporated herein by reference, it is submitted, that the decision interpreting and construing Rule 2 (3) Criminal Practice and Procedure is in error; that this Honorable Court has never passed upon the final construction of said Rule and that the error contained in the opinion of the Circuit Court should not stand as a precedent, either in regard to the claimed denial of justice to Petitioner, or for subsequent reliance by United States Courts upon the erroneous precedent established in Petitioner's case.

POINT ONE

The Circuit Court of Appeals erred:

1. In holding that where there is presented to the Circuit Court, in a Criminal Case, a Motion for a New Trial or to Remand, "solely upon the ground of newly-discovered evidence," as provided by the Rules of Practice and Procedure, etc., in Criminal Cases, the Circuit has the *discretionary* right to remand or to refuse to remand the case to the trial court to the end that the motion for new trial may be considered and ruled upon by the trial court.

2. In denying to petitioner, who had appealed from the judgment of the trial court, "within five (5) days after the entry of judgment of conviction," the right to move for a new trial and have that motion ruled by the trial court.

3. In holding that the Circuit Court and not the trial court should decide on the sufficiency of the affidavits and the probable effect on a new trial of the evidence set out in the affidavits appended to the motion for a new trial.

In passing upon the sufficiency of the affidavits submitted by the Petitioner in support of his motion to remand this cause to the trial court for its ruling upon a motion for a new trial the Circuit Court stated:

> "We have carefully reviewed all of the affidavits and find them to consist largely of hearsay statements and of impeachment of testimony received in the trial. We do not regard them as meeting the requirements, and particularly requirement (e) of Johnson v. United States, 32 Fed. (2d) 127 (C. C. A. 8)." (R., p. 147.)

Of course, in Johnson v. United States, the opinion, so far as the motion for a new trial was concerned, is primarily based upon the grounds as declared in that opinion:

> "First, the evidence was not *newly discovered;* and, second, the motion for a new trial does not disclose proper diligence. The first point alone, upon the facts in this case, is destructive of ap-

pellant's right to a new trial on the ground of newly discovered evidence."

We submit that "requirement (e) of Johnson v. United States" mentioned in the opinion of the Circuit Court, is not applicable, so far as the instant case is concerned.

We also respectfully urge that in the instant case, the affidavits submitted by the Petitioner in support of his request that his cause be remanded for ruling upon the motion for a new trial, demonstrate that the evidence which he will produce upon a new trial is newly discovered, and also, that the Petitioner has exercised proper diligence (see the affidavits on file of Ralph Wagner (R., p. 118), and Thomas Hunter, Frank E. Wellens, Theresa Pettinger and Luis A. Trias, Kimo Ward, Edith Hull, Lola E. Wagner, Jack Davis and William Cupples, referred to hereinafter).

The Notice of Appeal herein, is dated February 5, 1040, (R., p. 8) and was filed in duplicate with the clerk of the trial court on February 6, 1940. That clerk was by Rule IV of Criminal Practice and Procedure required to "immediately forward the duplicate Notice of Appeal to the clerk of the appellate court." That was done. From that time on, the circuit court had supervision and control of the proceedings. The jurisdiction of the trial court was lost, except as to its power to perfect and complete the record for appeal in aid of the circuit court's jurisdiction.

> "From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court

> shall, subject to these rules have supervision and control of the proceedings on the appeal. . . ." (Rule IV, Criminal Appeals Rules.)

Thereafter, so far as a new trial application is concerned,

> "the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment." (Rule II (3), Criminal Appeals Rules.)

It is apparent, therefore, that the Petitioner had done the only thing he could do after the appeal was perfected by applying to the Circuit Court for an order to remand this cause to the trial court for its ruling upon his motion for a new trial. He did that with diligence.

Granting for the moment, and for the purpose of argument only, that as held by the Circuit Court in its opinion, the affidavits submitted by the Petitioner "consist largely of hearsay statements and of impeachment of testimony received in the trial," we still urge that that did not justify the Circuit Court in refusing to remand.

Also the "requirement (e) of Johnson v. United States," quoted in the opinion of the Circuit Court, is not applicable here. Under the present rules of criminal practice and procedure, the Circuit Court need not and ought not consider the question as to whether or not "the newly discovered evidence would probably produce an acquittal." The appellate court need only

determine whether or not the matters set out in the affidavits in support of the motion to remand, justify the Appellate Court in remanding the case to the trial court. If the case is remanded, it is then up to the trial court to determine from the affidavits that may have been filed up to that moment whether or not a new trial should be granted. Those affidavits in support of the motion for a new trial may be and probably would be more persuasive in convincing the trial court that a new trial ought to be granted, than are the affidavits when considered by an Appellate Court.

This view is borne out by the changes that have been made in procedure on appeals, particularly as they have to do with application for a new trial. The present Rules of Practice and Procedure in criminal cases were promulgated by the Supreme Court, pursuant to an Act of Congress approved March 8, 1934. They became effective *after* the decision in Johnson v. United States, supra.

Under the old practice, if an appeal had already been taken, and the term of the trial court at which that decree, or judgment, was entered had not expired, and it was desired to reopen the cause for the taking of new evidence, the proper practice was to apply to the lower court to reopen the cause for the taking of new evidence, and in that case, to request the Appellate Court to remand the case. (O'Brien's Manual of Federal Appellate Procedure, 1929 ed., p. 39; also, Baltimore Co. v. Phillips (C. C. A. 2), 9 Fed. (2d) 903.)

Obviously, had that procedure been in force when this appeal was taken, and if within proper time the application had been made to remand the cause to the lower court, that lower court would consider on the motion for a new trial, whatever matters were then brought before it touching the motion for a new trial upon the ground of newly discovered evidence. It seems, therefore, that by the promulgation of the new rules which provide that the Appellate Court may remand the case to the trial court for its ruling upon the motion for a new trial, it was *not intended* to cut off the right of the appellant to have the trial court pass upon whatever information was then in its hands bearing upon the newly discovered evidence. In other words, the promulgation of the new rules ought not to circumscribe or cut down the right of the defendant to be heard on the motion for a new trial on any facts that would justify the trial court in granting a new trial on newly discovered evidence.

If, in support of his motion for a new trial before the lower court, the Petitioner was limited to the affidavits, then on file before the Circuit Court, there would be no reason whatever for the provision in the rules that the motion for a new trial shall be heard by the lower court when the case is remanded to that court by the Appellate Court. Surely, the Appellate Court would be equally competent to pass upon the sufficiency and merits of the affidavits then before it as would be the trial court. The very fact that the rules provide for the remanding of the case to the trial court

demonstrates that the trial court may consider whatever affidavits on newly discovered evidence that may be filed with that court in support of the motion for a new trial.

As to whether or not the affidavits now before this court "consist largely of hearsay statements and of impeachment of testimony received in the trial" we submit that such impeachment testimony would certainly have great bearing in the mind of the trial court as to whether or not those witnesses so impeached are worthy of belief. The impeaching testimony could hardly be held to be inadmissible hearsay if it goes to one of the very material points of the case; viz., the question as to whether or not the deductions in the Income Tax return were falsely and fraudulently claimed by the petitioner.

The language in the opinion of the Circuit Court, affirming the judgment of the District Court, clearly demonstrates the force of the point to which we now call this Honorable Court's attention. That opinion states:

> "We have no power to entertain a motion for a new trial; hence we consider only whether or not we should use our discretion to remand."

It later modified that sentence by stating:

> "We have no power to entertain a motion for a new trial, hence we consider only whether, in the exercise of our discretion, we should remand the case." (R. 152.)

A careful consideration of the rule referred to (Rule II, 2 (3), Criminal Practice and Procedure) demonstrates, that it is not a matter of discretion on the part of the Circuit Court as to whether or not it will remand the case to the lower court, *but one of duty.* That rule provides:

> "A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after *final judgment,* without regard to the expiration of the term at which judgment was rendered, *unless an appeal has been taken* and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment."

In the case of a defendant who has not appealed and who moves for a new trial solely upon the ground of newly discovered evidence before the trial court within the sixty (60) day period after final judgment, the trial court must consider and rule upon that motion.

A different situation, however, presents itself according to the rule in the event a defendant takes an appeal because, as the rule says, if "an appeal has been taken . . . the trial court may entertain the motion only on remand of the case oby the Appellate Court for that purpose."

In the case of a defendant who does not appeal the trial court must consider and pass upon the motion for a new trial made within sixty (60) days and made solely upon the ground of newly discovered evidence; in

the case of a defendant who does appeal, however, it would seem by the opinion filed in this case by the Circuit Court, that the defendant is denied his absolute right to compel the lower court to entertain and pass upon his motion for a new trial and must depend upon the good graces of the Appellate Court as to whether or not that court will remand the cause to the lower court to the end that the motion may be ruled.

The person who does not appeal may move for a new trial upon the discovery of new evidence at any time within sixty (60) days after the final judgment, and that trial court must hear the motion, but where he appeals he has no *right* to have the trial court pass upon the motion. He must await the determination by the Appellate Court as to whether or not that court will remand the case for a ruling on the motion. If the rule announced in the instant case were upheld, and if it is a matter of "discretion to remand," that which is a *right* in a defendant who does not appeal, in the hands of an appealing defendant becomes merely a *privilege,* which may be given or taken away in the "discretion" of the Appellate Court.

To illustrate. A man may be convicted and prosecute no appeal. Within sixty (60) days after judgment, he moves for a new trial upon newly discovered evidence which evidence we shall assume is most clear and convincing of his innocence. The trial court would be compelled to hear that motion for a new trial.

Now if the same man who under the same circumstances "within five (5) days after entry of judgment

of conviction" (Rule II (2), Criminal Practice and Procedure) the trial court would immediately lose jurisdiction, except to assist in the perfect and complete record for appeal, and under the present decision, the Appellate Court could use its own "discretion to remand"; although it is admitted that such Appellate Court has "no power to entertain a motion for a new trial." The exercise of the discretion against any remand is an *effective denial* of the motion.

Inasmuch as it is a right of persons convicted of crime who do not appeal from the judgment to use newly discovered evidence to effect a new trial, it certainly ought to be, and we think is a *right* of persons convicted of crime who do appeal, to use newly discovered evidence to obtain a new trial.

"That a new trial should ordinarily be granted because of newly discovered evidence" is elementary declared the court in Johnson v. United States, supra.

One other thought is worthy of consideration:

When and if the Appellate Court affirms a judgment, it becomes final unless an appeal is taken, and if the non-appealing defendant has a right to move for a new trial within sixty (60) days after the lower court's judgment is rendered, certainly the appealing defendant should have that same right after the case is back in the District Court from the affirming opinion of the Appellate Court. No action should be taken by an Appellate Court that would cut off or permit of the cutting off from an appealing defendant of any right which is accorded to a defendant who does not appeal.

POINT TWO

The Circuit Court first erred in holding that the newly discovered evidence should not be submitted to the trial court, and second, not allowing the trial court to decide whether the newly discovered evidence "shakes" the credibility of particular incriminating witnesses to a degree of affecting the decision of the trial court and probably affect the result of a new trial.

Petitioner submits that the newly discovered evidence set forth in the affidavits *does* discredit the particular witnesses, and a consideration of the testimony of each witness if discredited by the newly discovered evidence would, Petitioner submits, probably affect the result of a new trial.

1. Testimony of Charles W. Wagner.

(R., pp. 52 to 56):

Testified for the government to refute the deduction petitioner took from his income as a bad debt the amount of $1060.00 claimed by Petitioner to be owed him by Charles W. Wagner, his brother, by testifying that he (Charles W. Wagner) did not owe Petitioner any debt.

The affidavit of Edith Hull.

(R., pp. 123 to 125):

Shows that Charles W. Wagner owed her support and maintenance, by court order, for their infant son,

and told her the reason he could not pay the sums due was that he had borrowed money from Petitioner and that Petitioner had demanded payment, and therefore, he could not pay her until he had repaid Petitioner.

The affidavit of Kimo E. Ward.

(R., pp. 118 to 120):

Corroborates the fact alleged by Edith Hull, to-wit: that Charles W. Wagner did borrow money from Petitioner and did and does still owe Petitioner money.

The affidavit of Leo Ellis Wagner.

(R., pp. 120 to 121):

Corroborates the fact that Charles W. Wagner did and does owe Petitioner several thousand dollars.

2. The Testimony of Paul McPherson.

(R., pp. 40 to 44):

Called by the prosecution to refute the claim of Petitioner that he, among other things, paid $3500.00 to McPherson for a horse named Bert Abbey, and testified that Bert Abbey was purchased by Petitioner for $550.00.

The affidavit of Thomas Hunter.

(R., pp. 121 to 123):

Shows that Paul McPherson had told him he sold

Bert Abbey to Petitioner for $3500.00 and had paid $2500.00 for it from Roy Sherry.

The affidavit of Frank E. Wellens.

(R., pp. 125 to 126):

Shows the motive which caused Paul McPherson to falsify his testimony to the irreparable injury of Petitioner, in that Paul McPherson told Frank E. Wellens, "My testimony in the Wagner case was the cause of Wagner's conviction. If Ralph Wagner knew no more about his income tax for 1934 than he knew about horses, I am not surprised at his getting in trouble about his income tax. In 1934 I sold Wagner six or seven horses at an exorbitant cash price; and if I had testified in his case telling the price he paid me for the horses and the price for which I purchased them, I would have gotten into trouble for neglecting to pay my income tax on the several thousand dollars profit I made on my deals with Wagner in 1934."

3. The Testimony of Ernest Wagner.

(R., pp. 77 to 102):

In regard to the deduction claimed by Petitioner for a promissory note of $1808.00 for a debt owed him by Theresa Pettinger, and testified to by her son, Ernest Wagner, which was claimed by the prosecution to be false.

The affidavit of Theresa Pettinger.

(R., pp. 127 to 128):

Corroborates this testimonial fact that she does owe Petitioner $1808.00 and that she did sign the promissory note as evidence of this obligation.

4. The Testimony of Ben C. Axcley.

(R., pp. 56 to 65):

Regarding the execution of a fraudulent note by Charles W. Wagner to Petitioner as payee, and the attempt of Petitioner to age the note by putting it in his shoe, is discredited by

The affidavit of Luis A. Trias.

(R., pp. 128 to 129):

Which shows the malicious motive of Axcley to falsify his testimony against Petitioner, for reasons of envy, hate and revenge Axcley had toward Petitioner, to wit: his purposely advising Petitioner, as an attorney, about income tax law to get Petitioner into trouble, and his desire, by reason of Petitioner discharging him, to send Petitioner to prison.

5. The Testimony of Arlan Moore.

(R., pp. 19 to 32 and pp. 75 to 76):

Testified as the accountant who prepared Petitioner's income tax report and representing the "cost" fig-

ures as the "value" of Petitioner's assets, which misrepresented the true worth of Petitioner and was an erroneous factual statement in his return, for which Petitioner suffered conviction for a crime he had no intent to commit nor had knowledge of being committed.

The affidavit of Jack Davis—

(which is submitted for the first time):

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES)

Jack Davis, affiant, being first duly sworn deposes and says: that he is acquainted with Arlan Moore, the public accountant who was a witness in the case of United States versus Ralph W. Wagner; that he met Arlan Moore in the latter's office in the Equitable building, Los Angeles, California, on the 8th day of April, 1941, and conversed with him in the presence of William Cupples, Jr., regarding the trial and conviction of Ralph W. Wagner; that in said conversation Arlan Moore declared to affiant as follows: *"I got Wagner in bad with my testimony about those horses he bought in 1934, but I had to testify as I did to cover up a mistake I made when I prepared his income tax return. You see, when I prepared his tax return, I thought it was right to charge off depreciation of live stock on the basis of valuation; and I had Wagner give me his valuation of those horses, not the cost. Later I learned I should have charged*

off depreciation on the basis of cost, but it was too late then to do anything about it."

(Signed) Jack Davis also known as Jack Davis
Jack Davis, Affiant.

Subscribed and sworn to before me on this 9th day of April, 1941.

(Signed) Grace V. Smith
Notary Public in and for said County and State.
My Com. exp. Apr. 11, 1943.

The Affidavit of William Cupples, Jr.—

(which is submitted for the first time):

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES)

William Cupples, Jr., affiant, being first duly sworn deposes and says: that he is acquainted with Arlan Moore, a public accountant, and was present in the office of the said Moore in the Equitable building, Los Angeles, California, on the 8th day of April, 1941, during a conversation between Arlan Moore and Jack "Diamondfield" Davis regarding the trial and conviction of Ralph W. Wagner in the United States District Court; that during said conversation this affiant heard Arlan Moore positively declare as follows: *"I got Wagner into trouble with my testimony about some horses he had bought, but I had to protect myself from a*

mistake I had made in preparing his income tax return. At the time I made out his income tax return I thought it right and proper to figure depreciation of live stock from the valuation of the stock; and I had Wagner give me his valuation of his horses and not the price he paid for them. Later I learned that I should have figured the depreciation from the cost of the horses, but it was too late then to correct my mistake."

(Signed) William Cupples Jr.
William Cupples, affiant.

Subscribed and sworn to
before me on this 9th
day of April, 1941.
(Signed) Grace V. Smith
Notary Public in and for
said County and State.
My Com. exp. Apr. 11, 1943.

Petitioner prays that when the aforestated newly discovered evidence discrediting the primary prosecution witnesses, is considered it throws in doubt all of said witnesses' testimony, and with the credibility of said primary witnesses' testimony impeached there is not sufficient evidence upon which a conviction can be sustained. There is sufficient doubt created as to the reliability of prosecution witnesses that if the trial court had not been erroneously prevented from considering this newly discovered material evidence, it probably would have granted a new trial. With this evidence properly introduced in defense of Petitioner, an acquittal probably would have been ordered.

In closing your Petitioner expresses his profound gratitude for the consideration this Honorable Court has given him. He is forced to draw this Petition in his own behalf, being bereft of funds to employ counsel, having expended all his worldly goods on the attorneys heretofore employed to seek and obtain justice for him.

He is on the mercy of this Honorable Court, praying for a chance to have the opportunity in a new trial to defend himself by the introduction of the aforestated new material and substantial evidence which through the adversity of fate was not discovered at the time of his trial.

RALPH W. WAGNER,
Appearing in His Own Behalf.